No. 91-538

In The

Supreme Court of the United States

October Term, 1991

FORSYTH COUNTY, GEORGIA,

Petitioner,

vs.

THE NATIONALIST MOVEMENT,

Respondent.

On Writ Of Certiorari To The
United States Court Of Appeals
For The Eleventh Circuit

BRIEF OF THE CITY OF ORLANDO AS AMICUS CURIAE SUPPORTING PETITIONER AND MOTION FOR LEAVE TO FILE BRIEF AS AMICI CURIAE SUPPORTING PETITIONER BY THE INTERNATIONAL ASSOCIATION OF CHIEFS OF POLICE AND THE NATIONAL LEAGUE OF CITIES

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MOTION OF THE INTERNATIONAL ASSOCIATION OF CHIEFS OF POLICE AND THE NATIONAL LEAGUE OF CITIES FOR LEAVE TO FILE BRIEF AS AMICI CURIAE

The International Association of Chiefs of Police and the National League of Cities respectfully seek leave of this Court to join as amici curiae the amicus curiae brief filed by the City of Orlando, and as grounds therefor would state:

1. The International Association of Chiefs of Police consists of approximately 12,500 commanding officers of national, state, provincial, county, and municipal police agencies;

2. The National League of Cities is an organization consisting of more than 1400 cities and towns from all areas of the United States;

3. Pursuant to Supreme Court Rule 37, the movants have obtained permission to file as amici from the petitioner in this case, Forsyth County, Georgia. The Respondent, Nationalist Movement, has denied movants permission to file;

4. The question presented to this Court affects the interests of all police agencies and municipalities in the country;

5. Based on communication with Petitioner's counsel, movants believe that Petitioner's brief will be strictly limited to the facts of this case and will narrowly argue only the validity of the Forsyth County ordinance;

6. Movants wish to present this Court with facts and arguments addressed to the broader question of the propriety of assessing the actual costs of police services, provided those costs are calculated and imposed in a content-neutral and non-discriminatory manner;

7. The movants further wish to urge this Court to give local governments clear guidance on the extent to which they may permissibly regulate the costs necessarily involved in policing parade events.

WHEREFORE, the International Association of Chiefs of Police and the National League of Cities

respectfully request leave to join as amici curiae the brief of the amicus curiae City of Orlando.

Respectfully Submitted,

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BRIEF OF THE CITY OF ORLANDO AS AMICUS CURIAE SUPPORTING PETITIONER

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INTEREST OF THE AMICUS CURIAE

The City of Orlando is a municipal corporation organized and existing under the laws of the State of Florida, and a political subdivision thereof. This brief is filed pursuant to Supreme Court Rule 37.5 on behalf of the City of Orlando by an authorized law officer of the City. Orlando's parade permit ordinance was declared unconstitutional by the Eleventh Circuit in *Central Florida Nuclear Freeze Campaign v. Walsh*, 774 F.2d 1515 (11th Cir. 1985), *cert. denied*, 475 U.S. 1120 (1986). Orlando subsequently amended its ordinance to conform to the Eleventh Circuit's ruling. Pursuant to its amended ordinance, Orlando issues approximately 40 parade permits each year for the use of its public thoroughfares. These events include parades celebrating various secular and religious holidays, sports events, charitable endeavors, as well as the traditional communication of political views. Police costs associated with these events, for barricading the streets and sidewalks for the exclusive use of event participants and for the control and redirection of traffic at barricaded intersections and affected roadways, varies depending on the length and duration of the event. In 1991, costs for the 42 parades ranged from $0 for events requiring no special services, to $5,618.93 for an event involving multiple streets and lasting for three hours.

Although this Court has not addressed the parade permit issue for more than 50 years, cities, towns, and local police agencies throughout America continually face decisions involving such events and the appropriate allocation of scarce municipal resources. The interest of the amicus and movants is in encouraging this Court to decide the instant case in a fashion that will give local

governments clear guidance on the extent to which they may permissibly regulate the costs necessarily involved in policing parade events. The amicus and movants further urge this Court to resolve the issues in this case in a manner appropriately vesting in the affected governmental agency authority for managing and allocating its financial and human resources.

SUMMARY OF ARGUMENT

The Forsyth County, Georgia, ordinance at issue in the instant case is virtually identical in effect to the ordinance upheld by this Court in *Cox v. New Hampshire*, 312 U.S. 569 (1941). It requires persons seeking parade permits to pay the actual police costs incidental to the permitted activity and caps that fee at an amount substantially less in today's economic times than the cap upheld in *Cox*.

Nothing in the First Amendment to the United States Constitution requires that the government subsidize expressive activity. Provided the regulation is content-neutral, leaves open ample alternative means of communication, and is narrowly tailored to serve a significant government interest, an ordinance requiring persons to bear the necessary incidental costs concomitant to their choice of the means or forum they use to advance their views does not violate the Constitution.

ARGUMENT

I. A parade ordinance allowing a municipality to require payment of limited costs necessary to police an event involving expressive activity is consistent with this Court's established precedent in *Cox v. New Hampshire*, 312 U.S. 569 (1941).

The question presented in this case is whether a county parade ordinance requiring payment of a permit fee based on the actual cost of administration of the permit and the maintenance of public order during the event, up to the sum of $1000 per day, is constitutional; or whether, conversely, as the Eleventh Circuit has ruled, the First Amendment to the United States Constitution allows no more than "nominal" fees to be imposed on any expressive activity.

This Court last addressed this issue directly over fifty years ago in the case of *Cox v. New Hampshire*, 312 U.S. 569 (1941). At issue in *Cox* was a city parade permit scheme which allowed a fee of up to $300.00 to be required for the use of public streets. In upholding the constitutionality of the fee, the Court noted that:

> [t]he authority of a municipality to impose regulations in order to assure the safety and convenience of the people in the use of public highways has never been regarded as inconsistent with civil liberties but rather as one of the means of safeguarding the good order upon which they ultimately depend. The control of travel on the streets of cities is the most familiar illustration of this recognition of social need.

Id. at 574.

The Court in *Cox* went on to hold the license fee in that case, which ranged from $300 to a nominal amount and took into account the expense of policing the event, to be constitutionally permissible.

In more recent decisions, however, the circuit courts of appeals have split on the continued viability of the *Cox* decision and the corresponding ability of local governments to impose other than nominal charges on persons or groups involved in expressive activities. The Eleventh Circuit, in *Central Florida Nuclear Freeze Campaign v. Walsh*, 774 F.2d 1515 (11th Cir. 1985), *cert. denied*, 475 U.S. 1120 (1986), followed by its decision in the instant case, has held that the First Amendment permits no more than a nominal fee to be charged for the use of a public forum for public issue speech. In reaching this conclusion, the Eleventh Circuit found that this Court's decision in *Murdock v. Pennsylvania*, 319 U.S. 105 (1943), a decision invalidating as a tax a flat license fee applied to residential solicitors, limited all City imposed fees on expressive activity to a nominal amount. The Eleventh Circuit ruling leaves local governments with the Hobson's choice of either attempting to distinguish protected expressive activity from other activities on an event-by-event basis for the purpose of imposing costs or, alteratively, burdening the public fisc with the costs of all such special events.

The other courts of appeals which have considered this issue have not interpreted *Murdock* so broadly.[1] Both

[1] This narrower reading is supported by the fact that the *Murdock* opinion itself referenced *Cox* with no indication of disagreement with that decision.

the Ninth and the Sixth Circuits have held that public entities are free to charge their actual costs associated with First Amendment activities and that there is no constitutional requirement that such charges be nominal only. *Stonewall Union v. Columbus*, 931 F.2d 1130 (6th Cir.), *cert. denied*, ___ U.S. ___, ___ S.Ct. ___, 116 L.Ed.2d 227 (1991); *Kaplan v. Los Angeles*, 894 F.2d 1076 (9th Cir.), *cert. denied*, ___ U.S. ___, 110 S.Ct. 2590, 110 L.Ed. 271 (1990); see also *Baldwin v. Redwood City*, 540 F. 2d 1360 (9th Cir. 1976), *cert. denied*, 431 U.S. 913 (1977).

The ordinance under attack in the instant case is virtually identical in effect to the ordinance upheld by this Court in the *Cox* decision. It requires persons seeking parade permits to pay the actual police costs incidental to the permitted activity and caps that fee at an amount substantially less in today's economic times than the cap upheld in *Cox*.[2]

[2] Because the standard is so nebulous, it is all but impossible to make any meaningful comparison between Forsyth County's $1000.00 fee and the $300.00 benchmark in *Cox*. $300.00 compounded annually at four percent (4%) interest for a period of fifty years is $2,132.00 and at six percent (6%) interest is $5,526.00. This illustrates the difficulty in the use of the term "nominal" to define permissible fees or indeed in upholding any particular sum as constitutionally permissible at a particular point in time. Municipalities need more enduring guidance on the appropriateness of the direct costs that can legally be shifted to the users of their streets and byways for expressive purposes.

II. A parade ordinance allowing a municipality to require payment of the costs necessary to police an event involving expressive activity is permissible under the First Amendment to the United States Constitution.

Without question, city streets and sidewalks are, by definition, traditional public forums for the purpose of the exercise of expressive activities. *Frisby v. Schultz*, 487 U.S. 474 (1988); *United States v. Grace*, 461 U.S. 171 (1983). Regulations, therefore, imposing fees or costs in conjunction with the issuance of a parade or assembly permit for the use of city streets or sidewalks should be analyzed in the same manner as any other government regulation of a traditional public forum. As this Court has repeatedly held, reasonable time, place, and manner restrictions on expressive conduct are permissible "provided that they are justified without reference to the content of the regulated speech, that they are narrowly tailored to serve a significant governmental interest, and that they leave open ample alternative channels for communication of the information." *Clark v. Community for Creative Non-Violence*, 468 U.S. 288, 293 (1984); see also *Ward v. Rock Against Racism*, 491 U.S. 781 (1989); *United States v. Grace*, 461 U.S. 171 (1983). Government regulations imposing fees or costs which meet these standards do not violate the First Amendment and should be upheld.[3]

[3] An ordinance which fails to meet all of these standards, for example is not content-neutral because it takes into account the nature of the speech, must pass strict scrutiny and may only be upheld if justified based on a compelling state interest. *Boos v. Barry*, 485 U.S. 312, 321 (1988).

Provided that an ordinance such as Forsyth County's is content-neutral[4] and leaves open ample alternative means of communication[5], it is constitutionally consistent so long as it is narrowly tailored to serve a significant governmental interest.

There should be no question but that the government's interest in ensuring public safety and maintaining the orderly flow of pedestrian and vehicular traffic on public thoroughfares is significant. As this Court has repeatedly affirmed, "[g]overnmental authorities have the duty and responsibility to keep their streets open and

[4] In *Ward v. Rock Against Racism*, 491 U.S. 781 (1989), this Court interpreted the content-neutral requirement as meaning without regard to content as well as not based on any disagreement with the message. As applied to the cost of parade events, a content-neutral regulation would impose costs based solely on objective factors related to the logistics of the event, such as its length and duration, and would be consistently applied regardless of the nature of the event. Under this definition, the Forsyth County ordinance appears to be constitutional on its face.

[5] Per *Frisby v. Schultz*, 487 U.S. 474, 483 (1988), an ordinance leaves open ample alternative means of communication so long as "the ordinance permits the more general dissemination of a message." In the City of Orlando, which is undoubtedly representative of other municipalities across the nation, persons or groups can express their views by public speech, the carrying of signs, or the distribution of brochures on the streets and sidewalks or in public parks without restriction so long as they obey traffic and criminal laws and do not request the exclusive use of a public area. Because parade permit regulations like those in Forsyth County and the City of Orlando burden only one limited means of expression, leaving open ample alternative channels of communication, they meet this First Amendment standard.

available for movement." *Cox v. Louisiana*, 379 U.S. 536, 554-55 (1965); *Walker v. Birmingham*, 388 U.S. 307, 315 (1967) ("We have consistently recognized the strong interest of state and local governments in regulating their streets and other public places"). The justification for governmental regulation is particularly compelling when the expressive use of the streets or sidewalks is inconsistent with the ordinary use of these thoroughfares. See *Grayned v. Rockford*, 408 U.S. 104, 116 (1972). Under such circumstances, government involvement is essential for traffic control and public safety.

An ordinance advancing these significant governmental interests is considered "narrowly tailored" and hence consistent with the First Amendment provided it is reasonably related to governmental objectives and is not unnecessarily overbroad. The ordinance need not be the least restrictive conceivable means of meeting the government's goals, but need only be legitimately designed to advance those goals. *Ward v. Rock Against Racism*, 468 U.S. at 800.

The proponents of expressive activity do not have a constitutional right to express their views whenever and however they choose. *United States v. Grace*, 461 U.S. 171 (1983); *Adderly v. Florida*, 385 U.S. 39 (1966); *Cox v. Louisiana*, 379 U.S. 536 (1965). Local governmental entities have the freedom as well as the responsibility to make regulations governing the safe use of their streets and sidewalks. So long as ample alternative means are available for communication of views and ideas, the government should be free to regulate public thoroughfares in a nondiscriminatory fashion for the good of all citizens.

Chief among any government's duties to its citizens is an obligation to conserve and allocate precious governmental resources. Control of fiscal and human resources is properly a matter of local governmental discretion. While a local government may choose to bear all the costs associated with closing a public street, sidewalk, or other public property for a particular purpose, it may choose to require that the actual costs of such an event be paid by the group or individual seeking that peculiar use. So long as that decision is not made in a discriminatory fashion, nor vested in someone with unbridled discretion[6], the First Amendment should not operate to deny governments this right. Provided the group or individual has the choice of various communicative means but wishes to use a particular forum, the costs of that choice are not required by the Constitution to be vested upon the taxpayers responsible for the chosen forum.

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[6] An ordinance affecting expressive activity which vests discretion in the permitting authority without concomitant limits or standards would be constitutionally impermissible. *Lakewood v. Plain Dealer Publishing Co.*, 486 U.S. 750 (1988); *Shuttlesworth v. Birmingham*, 394 U.S. 147 (1969). Ordinances with fairly explicit standards, such as those in the ordinance at issue in *Stonewall Union v. Columbus, supra*, should be sufficient to pass constitutional muster. Ordinances are not required to be written with perfect precision and may allow some exercise of police judgment without violating the First Amendment. *Grayned v. Rockford*, 408 U.S. 104, 114 (1972). Alternatively, the existence of a reasonable cap, such as the $1,000 cap imposed by Forsyth County, on the allowable fees (based on anticipated actual costs), can constitute a sufficient limitation for First Amendment purposes. *Cox v. New Hampshire*, 312 U.S. 569 (1941).

This premise is entirely consistent with unrelated but analogous decisions of this Court dealing with the question of whether the government has any obligation to subsidize constitutionally protected activity. In a case where petitioners challenged the denial of a tax deduction for money spent on lobbying, this Court held that petitioners were not "being denied a tax deduction because they engage in constitutionally protected activities, but are simply being required to pay for those activities entirely out of their own pockets, as everyone else engaging in similar activities is required to do . . . ". *Cammarano v. United States*, 358 U.S. 498, 513 (1959).

In *Harris v. McRae*, 448 U.S. 297, 316 (1980), the Court upheld a law affecting abortion funding and stated,

> it simply does not follow that a woman's freedom of choice carries with it a constitutional entitlement to the financial resources to avail herself of the full range of protected choices. The reason why was explained in Maher: although the government may not place obstacles in the path of a woman's exercise of her freedom of choice, it need not remove those not of its own creation. Indigency falls in the latter category.

In *Regan v. Taxation With Representation of Washington*, 461 U.S. 540 (1983), the Court rejected a challenge to the anti-lobbying restrictions on organizations granted tax-exempt status pursuant to section 501(c)(3) of the I.R.S. Code. The Court identified the tax-exempt status as a government subsidy, but ruled that the First Amendment did not require the government to subsidize lobbying. The Court emphatically rejected the "notion that First

Amendment rights are somehow not fully realized unless they are subsidized by the State." *Regan*, 461 U.S. at 546, citing *Cammarano*, 358 U.S. at 515. The Court went on to note that "[w]e have held in several contexts that a legislature's decision not to subsidize the exercise of a fundamental right does not infringe the right . . . ". *Regan*, 461 U.S. at 549.

There is no material difference between the federal government's decision not to subsidize political expression through the tax laws or the federal government's decision not to subsidize family planning choices and a decision by a local government not to subsidize political expression through the contribution of police services. Nothing in the Constitution exempts groups or individuals involved in expressive activities from bearing the economic consequences of the choices they make with regard to those activities. Nor does anything in the Constitution require that the taxpayers subsidize the choices a group makes as to the methodology it employs to communicate its views – decisions which the taxpayer does not participate in making. If there is a cost attached to certain services, the Constitution does not prohibit governments from requiring that all persons desiring to use those services pay for their actual cost.

At issue in the instant case is whether local governments are required by the First Amendment to subsidize the costs associated with the expressive activities an individual or group chooses to conduct in a particular fashion, by the extraordinary use of a street, sidewalk, or other public property. Based on the *Cammarano*, *Harris*, and *Regan* decisions, this question must be answered in the negative. As this Court held in *Cammarano*, so long as

these individuals or groups are only being required to pay the actual costs involved in the use of their chosen forum, and so long as these costs are calculated and imposed in a reasonable, non-discriminatory fashion, such regulation is constitutionally permissible.

On this basis, the ordinance enacted by Forsyth County at issue in this case does not violate the First Amendment to the Constitution and must be upheld.

CONCLUSION

For the foregoing reasons, amicus curiae hereby urges this Court to reverse the en banc decision of the Eleventh Circuit Court of Appeals and uphold the right of local governments to assess groups or individuals seeking parade permits the actual cost of necessary police services so long as these charges are assessed in a constitutionally consistent manner.

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